Supreme Court, U.S.
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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF AMERICAN LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under the Federal Employers Liability Act ("FELA"), a defendant whose negligence has been found to be an actual and proximate cause of a single, indivisible injury to the plaintiff should be liable for only a portion of the injury to which it contributed.

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned professors of law at American law schools (See Appendix for biographical information of each *amicus curiae*), have a strong interest in this case for two reasons.

First, *amici*, all of whom teach, research, and write about tort law, have a strong interest in the proper development, exposition, and application of just principles of tort liability in all its various manifestations, including the Federal Employers' Liability Act (FELA). This Court's pronouncements on major principles of tort liability, such as the principles at issue in this case governing the proper allocation of liability among the multiple responsible causes of an injury, will have great influence not only on actions under FELA, but also on actions under tort law in general, federal admiralty law, environmental law, and many other areas of law.

Second, *amici*, as both teachers of law and lawyers, have a strong interest in the accurate exposition of legal cases, history, and principles in legal education and legal practice. We believe the petitioner's brief seriously misstates the past and present state of the law regarding the allocation of liability among the multiple responsible causes of an injury.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioner asserts that the traditional common law used fractional apportionment of liability (proportionate several liability), rather than joint and several liability or full several (separate) liability, for all cases other than those involving tortfeasors acting in concert; that this was the state of the law at the time that the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, was enacted in 1908; that FELA incorporates the common law's supposed preference for proportionate several liability; that joint and several

liability for independent tortfeasors existed only for a brief period during the middle of the twentieth century; and that the evolving common law, the Restatements, and just principles of liability support proportionate several liability.

All of these assertions are clearly incorrect.

Petitioner's description of the common law at the time of FELA's enactment misunderstands and confuses the distinct rules and doctrines governing procedural joinder and substantive liability. Under both the common law and federal admiralty law at the time of FELA's enactment, and long before, each defendant who tortiously contributed to a plaintiff's injury was fully liable for that injury, regardless of whether other tortious causes of the plaintiff's injury could be joined in the same lawsuit. See Part A *infra*.

Joint and several liability was intended and has been consistently employed by federal and state courts under FELA from the time of FELA's enactment. See Part B *infra*.

Under joint and several liability, a defendant generally is only liable for injuries for which it is fully responsible as a tortious, actual, and proximate cause. See Part C *infra*.

Under the evolving common law, joint and several liability continues to be overwhelmingly recognized as the fairest method of allocating liability among multiple responsible causes of an injury. See part D *infra*.

There is no basis for this Court to undertake the major step of discarding and overruling its own precedents and the universal understanding and practice of the federal and state courts over the last almost 100 years, which have uniformly held that joint and several liability is an integral part of FELA's comparative-responsibility liability regime, furthers FELA's broad remedial purposes, and is consistent with over 100 years of similar understanding and practice in both the common law and federal admiralty law.

ARGUMENT

A. Under the Common Law and Federal Admiralty Law at the Time of FELA's Enactment, and Long Before, Each Defendant Who Tortiously Contributed to a Plaintiff's Injury Was Fully Liable for That Injury, Regardless of Whether Other Tortious Causes of the Plaintiff's Injury Could Be Joined in the Same Lawsuit

The petitioner asserts that, under the common law at the time of FELA's enactment in 1908, apportionment of fractional liability among the multiple tortious causes of a plaintiff's injury was the "dominant," "general," "overwhelming" rule, and that defendants were held fully liable for an injury to which they contributed only if they acted in concert or with unity of purpose. Petitioner's Brief at 12-13, 32 & n.26, 34-36, 39-40, 49. This assertion is clearly incorrect. It is based on a confusion and misunderstanding regarding the traditional use of the terms "joint" and "several" to describe the distinct procedural and substantive aspects of liability – a confusion and misunderstanding that is warned against in the very sources that are cited by petitioner. *See, e.g.*, W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 413 (1937) ("the separate problems of joinder of parties in the same action, as a matter of procedure, and the substantive liability of two or more parties for the same result, require separate consideration, and have very little in common").

The terms "joint tort," "joint liability," and "joint tortfeasors" initially were primarily procedural terms that were applied to situations in which defendants could be joined in the same lawsuit, which under the traditional common law was allowed only in situations involving concerted action, in which each tortfeasor could be held liable for the consequences of each other's acts as well as

their own acts, or vicarious liability. *Id.* at 413-15, 430; J. Fleming, *The Law of Torts* 255 (8th ed. 1992).

Independently acting tortfeasors who tortiously contributed to the same injury, who in England are still called "concurrent tortfeasors" rather than "joint tortfeasors," could not be joined in the same action, yet each was "severally" (separately) liable for the entire injury. Fleming at 257-58; Prosser at 414-15, 418-19, 424, 439. As the *Restatement Third* notes, "before the advent of comparative responsibility, 'several liability' was employed to describe a defendant who was responsible for all of the plaintiff's damages but who could not be joined in a suit with any other defendant who may also have been responsible," as well as other situations in which different defendants caused separate injuries to the same plaintiff and were held "severally" (fully) liable "for the portion of the plaintiff's injury caused by that defendant." *Restatement (Third) of Torts: Apportionment of Liability* § 11 cmt. a, reporters' note at 109-110 (2000) (citation omitted) [*Restatement Third*].[1]

Procedural joinder of independently acting tortfeasors is now allowed, indeed encouraged, and it therefore is customary in the United States to refer to such independently acting tortfeasors, as well as tortfeasors acting in concert, as "joint tortfeasors." But, contrary to the

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[1] The petitioner's failure to distinguish the procedural joinder issue from the substantive liability issue is exemplified by its discussion of *McGannon v. Chicago & Nw. Ry.*, 199 N.W. 894 (Minn. 1924), in which the court merely held, following the restrictive procedural joinder rules then in effect, that the plaintiff's joinder as defendants in the same action of two successive employers who exposed the plaintiff to airborne sand and fumes at the same job site was improper because the employers had not acted in concert and their independent acts, which the court assumed resulted in two distinct injuries, "were not concurrent either in point of time *or in result*." *Id.* at 894, 895 (emphasis added).

assertions of petitioner, this procedural change did not result in any change in substantive liability.

Both before and after this procedural change, each tortfeasor, whether acting in concert or independently, was fully liable for the entirety of any injury that was caused by its tortious conduct, regardless of whether other tortfeasors or natural events also contributed to the same injury. (However, a plaintiff's total aggregate recovery from all the contributing tortfeasors can never exceed the amount of his actual damages.) *See, e.g., Miller v. Union Pacific R. Co.*, 290 U.S. 227, 236 (1933) ("The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone.") (citing a number of U.S. Supreme Court and federal Circuit Court cases from the 19th and early 20th centuries); *Pacific Tel. & Tel. Co. v. Hoffman*, 208 F. 221, 227 (9th Cir. 1913) ("[I]f concurring or successive acts of negligence of numerous persons combined together caused the plaintiff's injury, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury."); *Restatement Third* § 10 cmt. b, reporters' note at 104; C. Baker, *Tort* 142-43 (4th ed. 1986); 3 F. Harper et al., *The Law of Torts* § 10.1 at 1, 3-5, 7-10 (2d ed. 1986) [*Harper, James & Gray*]; W.P. Keeton et al., *Prosser and Keeton on the Law of Tort* § 46 at 322, § 47 at 324-29 (5th ed. 1984) [*Prosser & Keeton*].

Moreover, as the *Restatement Third* states, "Many courts, even before the 20th century, [allowed procedural joinder and thus] imposed joint and several liability on independent tortfeasors when their acts caused truly indivisible harm." *Restatement Third* § A18 cmt. a, reporters' note at 163 (citing Prosser, 25 Cal. L. Rev. at 418-19 & nn.35-38; Jackson, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 406 n.28, 408 n.35 (1939)). It traces such joint and several liability for independent tortfeasors at least as far back as 1771. *Id.*

At the time that FELA was enacted, joint and several liability for independent tortfeasors had already been firmly established in federal admiralty law as part of a comparative-responsibility regime that was in place long before the adoption of such regimes by the States:

> [T]he general maritime law has long recognized the concept of joint liability. For example, in *The Atlas*, 93 U.S. 302 (1876), the Supreme Court held that the insurer of cargo lost in a collision between two vessels caused by the fault of both could recover all of its damages from one vessel. The Court borrowed this rule from the common law, which recognized a plaintiff's right "to sue . . . all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." *Id.*, at 315; *see also The Alabama*, 92 U.S. 695 (1876); *The George Washington*, 76 U.S. 513 (1870); The *Juniata*, 93 U.S. 337, (1876); *The Sterling*, 106 U.S. 647 (1882) (describing the joint liability rule in admiralty as "well-established").

Simeon v. T. Smith & Son, Inc., 882 F.2d 1421, 1428 (5th Cir. 1988) (parallel citations omitted).

The common-law rule barring any recovery by a contributorily negligent plaintiff was replaced by a rule of *per capita* divided damages for vessel collision cases in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), and disagreement over its application outside the collision context was resolved in *The Max Morris*, 137 U.S. 1 (1890), which definitively replaced the prior rule with a rule of comparative responsibility. As the *Simeon* court observed, "Neither the Supreme Court nor the lower courts have ever retreated from the rule of joint liability under maritime law." *Simeon*, 852 F.2d at 1428 (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n. 7 (1979); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 2178 (1974); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042 (5th Cir. 1985); *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745, 756 (5th Cir. 1985); *Central Rivers Towing, Inc. v. City of Beardstown, Ill.*, 750 F.2d 565, 575 (7th Cir. 1984).)[2]

During the recent era of "tort reform," the term "several liability" has come to mean fractional or partial liability, rather than full liability, for the harm to which one contributed. As the *Restatement Third* notes, this use of the term "several liability" is "imprecise and potentially confusing" and historically inaccurate, for the reasons discussed above. *Id.* § 11 cmt. a, reporters' note at 109-110. However, deferring to the now prevalent usage, the *Restatement Third* uses the term "several liability" in its current sense of fractional or partial rather than full liability. *Id.* A more precise and less confusing term for such fractional or partial liability, which will henceforth be used in this brief, is "proportionate several liability." *See Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1084-89 (Ill. 1997); R. Wright, *Allocating Liability Among Multiple Responsible Causes: Joint and Several Liability for Actual Harm and Risk Exposure*, 22 U.C. Davis L. Rev. 1141, 1142, 1165-68 (1985) [Wright, *Allocating Liability*].

B. Joint and Several Liability Has Been Consistently Employed under FELA from the Time of FELA's Enactment

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[2] The Petitioner's Brief, at 43 n.38 & 46 n.43, implies that this Court adopted proportionate several liability in admiralty law in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). However, *Reliable Transfer* merely replaced the antiquated rule of *per capita* divided damages in the collision context with a rule of comparative responsibility. *See id.* at 397-99, 410-11. The Court explicitly stated that its holding "would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established . . . for personal injury cases." *Id.* at 409.

The petitioner asserts that Congress intended to incorporate proportionate several liability rather than joint and several liability as part of FELA's comparative-responsibility liability regime. Petitioner's Brief at 31-33 & n.26. This also is clearly incorrect. The petitioner bases its argument almost entirely on an assumption that proportionate several liability, rather than joint-and-several or full-several liability, was the general rule at the time that FELA was enacted – an assumption that, as was discussed in Part A *supra*, is completely false with respect to both the common law and the comparable federal admiralty law.

As this Court emphasized in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), FELA "expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." *Id.* at 507 (emphasis in original) (citing 35 Stat. 65, 45 U.S.C. § 51). The Court properly rejected the Missouri court's insistence on "but for" causation as an unduly restrictive concept of causation: "Under [FELA] the test . . . is simply whether the proofs justify with reason the conclusion that the employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506.

The petitioner asserts that, under *Rogers*, defendants are subjected to a "reduced causation standard" that holds them liable for damage they did not cause and that is different and significantly lower than the causation standard that is applied in their contribution claims against others who contributed to the same injury. Petitioner's Brief at 46-48. This also is not correct. Petitioner admits that a plaintiff in a FELA action must prove that the defendant's tortious conduct contributed to his injury. *Id.* at 48 & n.45. Petitioner cites Prosser's discussion of the "substantial factor" formula to support its claim that "[c]ausation requirements are often relaxed in toxic exposure cases to permit plaintiffs to recover more readily." *Id.* at 46 n.42 (citing *Prosser & Keeton* at 267-68). However, the "substantial factor" formula is routinely

invoked by courts inside and outside of tort law, along with simple "contribution" tests, to avoid incorrect findings of no causal contribution under the but-for test when there are multiple sufficient causes of an injury. *See Restatement (Second) of Torts* §§ 431 & 432 (1965); *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* § 27 & cmts. a, b, f, g (Tentative Draft No. 2, March 25, 2002) [*Restatement Third: Basic Principles*]; R. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 Vand. L. Rev. 1071, 1075-80, 1097-1109 (2001) [Wright, *Legal Responsibility*].

The courts have uniformly interpreted FELA, consistent with the common law and federal admiralty law at the date of its enactment and thereafter, as imposing full liability on the employer (after reduction for any contributory negligence by the plaintiff) for any injury that was contributed to by the employer's negligence, despite other contributing causes. For example, in *Husky Refining Co. v. Barnes*, 119 F.2d 715 (9th Cir. 1941), in which a railroad motorman was killed in a collision between a truck and the train on which he was working, the court held that, although the two defendants were not "joint tortfeasors," since they were not acting in concert, they were each (including the railroad under FELA) fully liable for the plaintiff's injury: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held liable for the entire damage – not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." *Id.* at 716 (citations omitted).

See, e.g., Jenkins v. Southern Pac. Co., 17 F. Supp. 820, 824-25 (S.D. Cal. 1937) (various parties responsible for the death of a railroad conductor as a result of his being assaulted by a passenger on the train, including the railroad under FELA, held jointly and severally liable for entire damages), *rev'd on other grounds, Jenkins v. Pullman Co.*, 96 F.2d 405 (9th Cir. 1938), *aff'd, Pullman Co. v. Jenkins*, 305 U.S. 534 (1938);

Louisville & N.R. Co. v. Allen, 65 So. 8, 12 (Fla. 1914) (railroad employer liable under FELA and third party liable under state law each jointly and severally liable for railroad employee's entire injury); *Riley v. Minneapolis & St. L.R. Co.*, 156 N.W. 272, 273 (Minn. 1916) (same); *Lindsay v. Acme Cement Plaster Co.*, 190 N.W. 275, 278 (Mich. 1922) (same); *Demopolis Tel. Co. v. Hood*, 102 So. 35, 37 (Ala. 1924) (railroad employer liable under FELA and third party liable under state law each severally liable for railroad employee's entire injury); *Southern Ry. Co. v. Blanton*, 10 S.E.2d 430, 436-37 (Ga. App. 1940) (railroad employer liable under FELA and third party liable under state law each proximate cause of and liable for railroad employee's entire injury); *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 389-91 (Ks. 1982) (despite adoption of proportionate several liability for state tort law claims and lack of provision for contribution or indemnity action against third party tortfeasor in FELA, railroad employer is fully liable under FELA for injury to employee resulting from collision with truck at railroad crossing, and railroad can maintain contribution or indemnity action against the truck driver); *Narcise v. Illinois C. G. R. Co.*, 427 So. 2d 1192, 1195-96 (La. 1983) (certified question from U.S. Court of Appeals for the Fifth Circuit) (solidary [joint and several] liability exists between defendant railroad liable under FELA and third party liable under state tort law, and defendant railroad can maintain contribution or indemnity action against third-party tortfeasor); *Bean v. Missouri Pac. R. Co.*, 525 N.E.2d 1231, 1234 (Ill. App. 1988) (railroad defendant under FELA and third-party tortfeasor under state tort law are joint tortfeasors who can maintain contribution claims against one another); *Gilbert v. CSX Transp., Inc.*, 397 S.E.2d 447, 450 (Ga. App. 1990) (same); *Lewis v. Nat'l R. Passenger Corp.*, 675 N.Y.S.2d 504, 505-06 (Civil Ct. NYC 1998) (state proportionate-several-liability statute cannot be used in FELA action to limit the defendant railroad's full liability); Annotation, *Right of Railroad, Charged with Liability for Injury to or Death of Employee under Federal Employers Liability Act, to Claim*

Indemnity or Contribution from Other Tortfeasor, 19 A.L.R.3d 928, 931 (1968).

C. Under Joint and Several Liability, a Defendant Generally Is Only Liable for Injuries for Which it Is Fully Responsible as a Tortious, Actual, and Proximate Cause

The petitioner asserts that, in any case in which there are multiple contributing causes of a plaintiff's injury, including even innocent human and natural causes (which will always exist), holding the defendant fully liable for the injury to which it contributed (under the doctrine of joint and several liability or otherwise) results in the defendant being held liable for more damages than she tortiously caused or for which she was responsible. See Petitioner's Brief at 1-2, 31-33 & n.26, 40 & n.35, 43 n.38, 46-47. As the courts have almost universally noted in upholding the doctrine of joint and several liability after the adoption of comparative responsibility, this assertion is false.

For example, in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), the Supreme Court of Illinois stated:

> We note that the proposition which defendants offer as the primary explanation for abolishing the doctrine of joint and several liability, *i.e.*, the assertion that the doctrine requires tortfeasors to pay for more damages than they caused, is at odds with this court's explanation of joint and several liability in [*Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (1983)] . . . [T]he *Coney* court stated:
>
> > "The feasibility of apportioning fault on a comparative basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule. *A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage.* *** The mere

> fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another *does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.*" (Emphasis added.)

The principle that tortfeasors who are held jointly and severally liable are each fully responsible for the entirety of the plaintiff's injury has been explained:

> "Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury *only if her tortious behavior was an actual and proximate cause of the entire injury*. [Emphasis added.] She is not liable for injuries, including separable portions of injuries, to which she did not contribute. She is not liable unless the tortious aspect of her conduct was an actual cause of the injury. Moreover, even then, she is not liable if, for reasons of policy or principle, her connection to the injury is considered too remote or minimal to be 'proximate.'"

Id. at 1086 (citations omitted).

As the *Best* court noted, *id.* at 1087, there is a fundamental difference between each tortfeasor's *individual full responsibility* for an injury that it tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the tortfeasors' individual full responsibilities for the injury. For example, if two defendants were each negligent, actual, and proximate causes of a plaintiff's injury, neither is merely "50% negligent," a cause of only 50% of the injury, or only "50% responsible." Such statements make as much sense as saying that someone is 50% pregnant or

caused 50% of a death or a broken leg. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual and proximate cause of 100% of the injury. Each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury.

Like the *Best* court, the vast majority of State courts have held that a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. See part D *infra*. Rather, as the courts have held, such concurrent contribution to an injury by multiple tortfeasors provides a basis for claims *among the tortfeasors themselves*, in the form of contribution or indemnity actions, for an equitable sharing of their joint and several liability to the plaintiff based on their comparative responsibility.

A tortfeasor's individual full responsibility for an injury is most obvious when its tortious behavior was either necessary or independently sufficient for the occurrence of the injury. *See* Prosser at 432-34. Yet, under the petitioner's proportionate-several-liability approach, each of 100 defendants would only be liable for one percent of an injury even if each was an independently sufficient cause of the injury – for example, if each of 100 defendants (intentionally or negligently) independently fired a fatal bullet into the plaintiff's brain or negligently put sufficient poison in the plaintiff's coffee to cause death.[3]

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[3] A draft of the *Restatement Third: Basic Principles* would treat "trivial and insubstantial contributions" to an injury as an actual cause of the injury, but not as a proximate cause unless the trivial or insubstantial contribution was a necessary ("but for") cause of the injury: "the actor who tortiously provides the straw that

The full-responsibility argument may seem less intuitively obvious when, as in some pollution and toxic exposure cases, the defendant's tortious conduct clearly contributed to an indivisible injury, but it was neither necessary nor independently sufficient to cause the injury. For example, assume that three drops of poison are necessary for a coffee drinker's death, and that four tortfeasors, acting independently of one another, each negligently put one drop of poison in the coffee cup.

It clearly would not be correct to assert that each defendant was only "25% negligent" or caused only one-fourth of the coffee drinker's death. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual cause of the coffee drinker's indivisible death and all the consequent damages. *See Restatement Third: Basic Principles* § 27 & cmts. a, f, g; Wright, *Legal Responsibility*, at 1100-01, 1106-08.

If there had been only three defendants, each of them clearly would have been individually fully responsible as a necessary ("but for") cause of the injury. It is not clear why this individual full responsibility should be reduced to responsibility for only one-fourth of the injury merely because a duplicative drop of poison was added by a fourth defendant. Such a result would potentially subject plaintiffs

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breaks the camel's back is subject to liability for the broken back." *Restatement Third: Basic Principles* § 29 cmt. q. Presumably, a tortious contribution that is *independently sufficient* for an injury is neither trivial nor insubstantial, regardless of how *de minimus* it might be in relation to the aggregate contributing causes. Similarly, a tortious contribution should not be deemed trivial or insignificant, even if it is neither necessary nor independently sufficient and is *de minimus* in relation to the aggregate causal contributions, if it is not *de minimus* in relation to the other contributions individually. The draft Restatement's illustrations refer to contributions that are trivial and insignificant in comparison to the other distinct contributions to the injury, rather than in comparison to all the causal contributions in the aggregate.

to a perverse "tortfest," in which the more tortfeasors there were, the less liable each would be, although the tortious behavior of each defendant remained constant and was an actual cause of the plaintiff's entire injury.

Thus, when there are multiple tortious contributions to a single, indivisible injury, none of which by itself was either necessary or independently sufficient for the occurrence of the injury, many courts have held the tortious contributing causes jointly and severally liable. Other courts have treated the injury as being theoretically divisible into separately caused portions, even when it clearly was not, to justify a shift to what amounted to proportionate several liability. *See* 3 *Harper, James & Gray* § 10.1 at 25-29; 4 *id.* § 20.3 at 120-21, 125-26 & nn.28-30; *Prosser & Keeton* § 52 at 345-46, 349, 351, 354-55.[4]

The *Restatement Second* uncomfortably reflects this division of authority. It would allow defendants in such situations to be liable for only a portion of the resulting damages if there was a reasonable basis for apportionment or division according to the relative contribution of each defendant. *See Restatement Second* §§ 433A & 881. However,

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[4] It has been suggested that the reluctance of the second group of courts to impose joint and several liability was due to the former rule that did not allow a tortfeasor who initially paid for the injury to obtain contribution from the other tortfeasors. *Prosser & Keeton* § 52 at 349. This reluctance should be substantially diminished when, as is true in almost all jurisdictions today, contribution is permitted based on the tortfeasors' comparative responsibility. Indeed, as is discussed further in Part D *infra*, two of the most frequent exceptions in the statutes eliminating, limiting, or modifying joint and several liability have been the exceptions that retain joint and several liability in situations involving environmental pollution or toxic substances.

its illustrations inconsistently treat very similar situations as being or not being "divisible" or "apportionable."[5]

However, in illustrations 14 and 15 to § 433A, in which two defendants similarly each negligently discharge oil into a stream, and the combined oil in the stream is ignited and the fire spreads to and burns down plaintiff's barn (illus. 14) or is drunk by the plaintiff's cattle which are thereby poisoned and die (illus. 15), the plaintiff's injuries are deemed indivisible and each defendant is fully (jointly and severally) liable for the entirety of plaintiff's damages. This is so, apparently regardless of the ability to measure the defendants' relative contributions of oil, because "certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. . . . [I]t is impossible . . . to say that one man has caused [part] of it and another the rest." *Id.* comment *i*. This is stated to be true for all or almost all injuries to persons or tangible property. *Id.*

Some of the pollution or toxic-exposure cases involve situations in which there are, or may be, theoretically separable injuries attributable to distinct causes, but it is practically impossible to distinguish the separable injuries and their distinct causes. These cases are similar to the multiple collision cases, in which the first defendant negligently caused the initial collision, which resulted in

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[5]For example, in *Restatement Second* § 433A illustration 5, two defendants each negligently discharge oil into a stream, making the water unusable for industrial purposes by a lower riparian property owner. The injury to the plaintiff is treated as being divisible or apportionable, apparently because the respective contributions to the combined pollution can be measured (70% and 30%, respectively). Similarly, in Restatement 2d § 881 illustration 2, in which three defendants operating smelter plants in a farming community "each send out fumes of equal concentration that unite and denude the grass of a nearby farmer, each defendant is said to be liable only for "the proportion of the total harm that his proportion of the fumes bears to the total amount of fumes."

some injury to the vehicle or person of the plaintiff, and a second plaintiff negligently caused the second collision, causing additional injury to the vehicle or person of the plaintiff. Assuming the second collision would not have occurred in the absence of the first collision, the first defendant's negligence was a necessary (but for) cause of both the initial and additional injuries, and she therefore is responsible for all of the injuries. However, the second defendant's negligence was only a cause of the additional injury due to the second collision.

Another group of similar cases is the animal trespass cases, in which, for example, trespassing cattle belonging to different defendants consumed the plaintiff's crops, or dogs belonging to different defendants killed the plaintiff's sheep. In these cases, each defendant's animal caused theoretically separable injuries to the plaintiff. Cases involving multiple sources of pollution sometimes are analogized to the multiple animal cases, but most of the pollution cases are instead similar to the coffee drinker hypothetical, in which each drop of poison (pollution) contributed to the entire injury.

When there are theoretically separable injuries attributable to distinct causes but it is difficult or impossible to actually distinguish (even roughly) the injuries or their causes, the modern approach has been to hold each defendant who tortiously contributed to (at least some of) the injuries jointly and severally liable for all the injuries, unless the tortfeasor can prove that she did not contribute to some separable portion of the injuries or could only have contributed to a certain maximum portion. *See Michie v. Great Lakes Steel Division*, 495 F.2d 213 (6th Cir. 1974); *Maddux v. Donaldson*, 108 N.W.2d 33 (Mich. 1961); *Restatement Second* § 433B(2); *Restatement Third* § 11 cmt. b at 109, § C18 cmt. a & reporters' note; 3 *Harper, James & Gray* § 10.2, at 26-29; 4 *id.*, § 20.3, at 117-18, 124 n.27, 127-29 & n.32; *Prosser & Keeton* § 52, at 345-46, 348-53.

Restatement Third § 26 replaces the *Restatement Second*'s ambiguous provisions and conflicting illustrations. *See id.* cmt. b. It rejects the petitioner's position, that damages or injuries should be treated as divisible based merely on relative causal contribution or percentages of comparative responsibility, *see* Petitioner's Brief at 40-41 & 49, and instead treats them as being divisible only if there truly are separable injuries or losses that can be attributed to different persons based on causation. *Restatement Third* § 26 & cmts. a, c, d & h. Damages are divisible only "when the evidence provides a reasonable basis for the factfinder to determine: (1) that [a person's tortious conduct] "was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct." *Id.* § 26.

The illustrations in the *Restatement Third* all relate to successive injury cases where there are theoretically and practically separable injuries. Although all that is required is a reasonable basis for division, *id.* cmt. f, the burden is on the party alleging divisibility (normally the defendant) to prove the divisible damages or injuries, based on causation, with sufficient evidence. "Unless sufficient evidence permits the factfinder to determine that damages are divisible, they are indivisible." *Id.* cmt. g. As is discussed in Part D *infra*, the *Restatement Third* would leave the issue of the allocation of liability for indivisible (inseparable) injuries to the disparate law of the various states. *Id.* §§ 17 & 26.

D. Under the Evolving Common Law, Joint and Several Liability Continues to Be Overwhelmingly Recognized as the Fairest Method of Allocating Liability among the Multiple Responsible Causes of an Injury

Petitioner asserts that, except for a period during the middle of the twentieth century, the evolving common law (including federal law) has retained a supposed preference for fractional apportionment of liability among the

contributing causes of a plaintiff's injury. Petitioner's Brief at 12-13, 32, 39-40, 42-43, 49-50. Again, this assertion is clearly incorrect.

Pure joint and several liability is the universal rule in common-law and civil-law regimes outside the United States, almost all of which employ comparative-responsibility principles.[6] It also is overwhelmingly preferred by courts in the United States. As was discussed in Part A *supra*, this Court has consistently employed joint and several liability as part of a comparative-responsibility regime in federal admiralty law since the 19th century. *See Restatement Third* § C21 cmt. a, reporters' note at 214.

All but a handful of State supreme courts have concluded that joint and several liability should be retained rather than being replaced by proportionate several liability under a comparative-responsibility liability regime. *See, e.g., Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Walton v. Tull*, 356 S.W.2d 20, 26 (Ark. 1962); *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978); *Tucker v. Union Oil Co. of California*, 603 P.2d 156, 163-69 (Idaho 1979); *Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (Ill. 1983); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1084-89 (Ill. 1997); *Rozevink v. Faris*, 342 N.W.2d 845 (Iowa 1983); *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849 (Minn. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984); *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1311-14 (Wash. 1978); *Sitzes v. Anchor Motor Freight*, 289 S.E.2d 679, 684-85 (W. Va. 1982); *Wisconsin Natural Gas Co. v. Ford*,

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[6] *See* Fleming at 275-76; A.M. Honoré, *Causation and Remoteness of Damage*, in XI *International Encyclopedia of Comparative Law, Torts, Pt. 1*, §§ 7-141, 7-189(2), 7-193 (A. Tunc ed. 1983); C. von Bar, 1 *The Common European Law of Torts* 334-38 (1998); A. Weir, *Complex Liabilities*, in XI *International Encyclopedia of Comparative Law, Torts, Pt. 2*, §§ 12-79 to -86, 12-105 to -109, 12-131 to -133 (A. Tunc ed. 1983).

Bacon & Davis Constr. Corp., 291 N.W.2d 825, 833-35 (Wisc. 1980).

As the *Restatement Third* states,

> The joint and several liability of negligent parties acting independently who cause a single indivisible injury gained wide acceptance before the tort-reform legislation of the mid and late 1980s. This was true whether the injury was one that was truly indivisible (such as two vehicles colliding and breaking the plaintiff's leg) or was theoretically divisible, but, because of problems of proof, could not be apportioned based on the causal roles of each defendant (e.g., marauding cattle belonging to several defendants who destroy a field of crops).

Restatement Third § A18 cmt. a, reporters' note at 163 (citation omitted); *see Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983) ("[O]f the thirty-eight other states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a [limited or] modified form, and only three have done away with it (two by statute, one by court decision)."); 3 *Harper, James & Gray* § 10.1 at 29-30; 4 *id.* § 22.17 at 413-16; *Prosser & Keeton* § 67 at 475; V. Schwartz, *Comparative Negligence* § 16.4, at 258-61 (2d ed. 1986); W. McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 Okla. L. Rev. 1, 3-4 (1979).

The shifts away from pure joint and several liability almost all occurred as a result of legislative action during the 1980s and early 1990s, rather than through judicial elaboration of the common law. *See Restatement Third* § B18 cmt. a, reporters' note at 170-71. The three State courts that replaced joint and several liability with proportionate several liability in whole or part mistakenly assumed, like the petitioner, that joint and several liability results in a

defendant's being held liable for more than it caused or is responsible for.[7]

The same erroneous assumption, together with other erroneous arguments – for example, that joint and several liability for independently acting tortfeasors was an anomalous mid-twentieth-century development that was inconsistent with the earlier common law – motivated the legislative changes in the joint and several liability doctrine during and following the liability insurance crisis in the mid-1980s. *See* Wright, *Allocating Liability*, at 1165-68; R. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis St. U.L. Rev. 45 (1992); R. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. Davis L. Rev. 1147 (1989).

Yet, contrary to the implication of the petitioner, *see* Petitioner's Brief at 13, 32, 39-40, 42-43, joint and several liability has been replaced with proportionate several liability (and, even then, never entirely) in only a few states. The *Restatement Third* summarizes: "There currently is no majority rule . . . , although joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform

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[7] *See Bartlett v. New Mexico Welding Supply*, 646 P.2d 579, 582 (N.M. App. 1982) (assuming the doctrine "hold[s] a person liable for an amount greater than the extent that person caused injury"), *cert. denied*, 648 P.2d 784 (N.M. 1982); *Laubach v. Morgan*, 588 P.2d 1071, 1074 (Okla. 1978) ("By doing away with joint liability plaintiff will collect his damages from the defendant who is responsible for them."), *limited by Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980) (noting criticisms of *Laubach* by McNichols, *supra*, and retaining joint and several liability for innocent plaintiffs); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) (assuming that adoption of proportionate several liability was necessary to ensure that "a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence").

during the 1980s and 1990s." *Restatement Third* § 17 cmt. a at 147.

The following listing of the rules in the various states is based on the tabulation in the *Restatement Third* § 17 cmt. a, reporters' note at 151-59, unless otherwise noted.

- Only sixteen states (Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Mexico, North Dakota, Tennessee, Utah, Vermont, and Wyoming) have adopted pure proportionate several liability, subject to various exceptions. For example, Alaska, Idaho, and Nevada retain joint and several liability for claims involving hazardous or toxic substances. Arizona preserves joint and several liability for liability arising under FELA (Ariz. Rev. Stat. Ann. § 12-2506(D)(3) (West Supp. 2001)). New Mexico preserves joint and several liability for claims involving products and situations having a sound basis in public policy.

- Fifteen jurisdictions (Alabama, Arkansas, D.C., Delaware, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia) have retained pure joint and several liability, with certain limitations in Minnesota and South Dakota.

- Two states (Missouri and Oregon) have retained joint and several liability with reallocation of uncollectible shares, which is equivalent to pure joint and several liability for non-negligent plaintiffs; Oregon retains pure joint and several liability for claims based on hazardous waste or water or air pollution.

- One state (Connecticut) employs proportionate several liability but reallocates uncollectible shares; for economic damages, the reallocation takes place only among the tortfeasors. Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1988).

- Three states (Georgia, Oklahoma, and Washington) have retained joint and several liability unless the plaintiff was contributorily negligent. Washington retains joint and several liability regardless of the plaintiff's contributory negligence for claims involving products, hazardous materials, or tortious interference with contract.

- Two states (Hawaii and New York) retain joint and several liability for economic damages and, if the defendant's comparative responsibility is equal to or greater than a certain percentage (25% in Hawaii, 50% in New York), also for noneconomic damages. However, each state retains pure joint and several liability for the most prevalent types of claims: Hawaii for environmental, plane-crash, toxic, product, asbestos, and motor-vehicle claims; New York for environmental, product, motor-vehicle, and gross negligence claims.

- Six states (Illinois, Montana, New Hampshire, New Jersey, Texas, and Wisconsin) retain joint and several liability for economic and noneconomic damages if the defendant's comparative responsibility is more than a certain percentage, ranging from 25 to 60 percent. Montana and New Hampshire reallocate uncollectible shares. Illinois (Ill. Comp. Stat., ch. 735, ¶ 5/2 -1118 (1992)) and New Hampshire retain pure joint and several liability for environmental pollution claims. New Jersey and Texas have much lower thresholds (5% and 15%) for joint and several liability for environmental claims.

- One state (Mississippi) retains joint and several liability for up to 50 percent of the recoverable damages.

- Three states (California, Florida, and Nebraska) retain joint and several liability for economic damages only, subject to various thresholds and caps in Florida except for pollution claims and claims for $25,000 or less.

- Two states (Iowa and Ohio) retain joint and several liability only for economic damages and only if the defendant's percentage of comparative responsibility is greater than or equal to 50 percent. Ohio's 1996 omnibus "tort reform" statute was voided in its entirety by the Ohio Supreme Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (1999).

As can be seen from the above listing, a substantial majority of the states, including many of those adopting pure proportionate several liability for most situations, retain joint and several liability for claims involving environmental pollution and/or toxic substances. Federal and state agencies often stress the need to retain joint and several liability in such situations. For example, the Reagan Administration's Tort Policy Working Group sought to preserve the government's ability to hold polluters jointly and severally liable under federal environmental statutes, which "are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. . . . Without some degree of joint and several liability under [these statutes], the effective enforcement of these programs could be impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs." U.S. Att'y Gen. Tort Policy Working Group, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 65 n.7(Feb. 1986).

The *Restatement Third* and all or almost all states also retain joint and several liability for intentional tortfeasors, tortfeasors acting in concert, tortfeasors who negligently fail to protect plaintiffs from intentional injury by another, and tortfeasors who are vicariously liable for injuries tortiously caused by others. *Restatement Third* §§ 12-15.

Otherwise, and again contrary to the petitioner's implication, *see* Petitioner's Brief at 40-43, 49, the *Restatement Third* formally takes no position on the preferred rule, rather deferring to the disparate rules adopted in each State. *See Restatement Third* § 17 & cmt. a. However, in its discussion of the principal variations, it makes clear its distaste for pure proportionate several liability:

> [S]evera̅l liability shifts the burden of insolvency from defendants to plaintiffs and creates a symmetrical unfairness to that existing with pure joint and several liability when a plaintiff is also comparatively responsible for damages. Indeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some [being non-negligent] are not comparatively responsible for their damages.

Restatement Third § 11 cmt. a at 109; *see id.* § C21 cmt. a, reporters' note at 214-15 ("[E]ven with the plaintiff sharing some fault, each defendant (as well as the plaintiff) is still a legal cause of all of the plaintiff's damages. Shifting the entire risk of insolvency to the plaintiff 'merely transform[s] the inequity of imposing that risk entirely on solvent defendants into the equal and opposite inequity of imposing the risk entirely on the plaintiff.'") (citation omitted); *id.* § A19 cmt. e, reporters' note at 167; *id.* § B18 cmt. a; *id.* § B19 cmt. d (describing effects of several liability on plaintiffs as "harsh").

As the *Restatement Third* indicates, there is absolutely no justification for treating the contributorily negligent plaintiff worse than the defendants who tortiously injured him, and there is worse than no justification for treating a non-negligent plaintiff worse than the defendants who tortiously injured him. Yet this is the result that is reached under pure proportionate several liability, according to which the share of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors is placed

entirely on the plaintiff, even if the plaintiff was not negligent, which is an unjustified disparate treatment under the comparative responsibility principle.

Moreover, it is not only the risk of tortfeasors' insolvency that is shifted entirely onto plaintiffs, even if they were not contributorily negligent, but also the substantial burden and costs of identifying, suing, and recovering their comparative responsibility shares from each tortfeasor. *Cf. Restatement Third* § 10 cmt. b, reporters' note at 105, § A18 cmt. a.

While making no formal endorsement, the *Restatement Third* states that its Track C, which consists of joint and several liability with reallocation of uncollectible shares among all the available responsible parties, including the plaintiff if the plaintiff was contributorily negligent, is the fairest approach:

> The allocation of the risk of insolvency adopted in this "C" Track is the fairest means of handling this problem. Reallocation may have some administrative costs and can create incursions on finality and administrative efficiency. Nevertheless, if handled expeditiously and with the flexibility reflected in Comment *h*, the administrative inconvenience of this reallocation system should be manageable.

Id. § C21 cmt. a; *see id.* § 17 cmt. a at 148.

This joint – and – several – liability – with - reallocation approach was the approach adopted by the Uniform Commissioners of State Laws in the Uniform Comparative Fault Act. Unif. Comp. Fault Act § 2, 12 U.L.A. 39 (West Supp. 1990). Sections 5 and 6 of the current draft of the Uniform Apportionment of Tort Responsibility Act provide for proportionate several liability with reallocation, which, however, is much less desirable than the reallocation scheme in the *Restatement Third* and the Uniform Comparative Fault Act, which use joint and several liability rather than

proportionate several liability as the foundation for subsequent reallocation.

Under modified joint and several liability, the plaintiff can initially recover the full amount of his claim (after reduction by his percentage of comparative responsibility if he was contributorily negligent) from any available and solvent tortfeasor, subject to possible partial escrow pending possible subsequent reallocation. The tortfeasor who compensated the plaintiff then bears the expense of locating the other tortfeasors, preparing and proving contribution claims against them, and collecting on those claims. Conversely, under modified proportionate several liability, the plaintiff must bear the expense of locating each tortfeasor, preparing and proving liability claims against each of them, collecting each tortfeasor's initial proportionate several liability share, and then coming back to each (hopefully still) available and solvent tortfeasor to collect her share of any uncollectible shares. Generally, the injured plaintiff, rather than the available solvent defendant, can much less afford the significant expense and delay involved in this process. *Cf.* 4 Harper et al. § 22.17, at 413 (defendants are more likely to be insured).

Moreover, the modified joint and several liability rule has the advantage of being able to be applied across the board, in situations involving innocent plaintiffs as well as contributorily negligent plaintiffs, whereas the modified proportionate several liability rule has not the slightest bit of justification in situations involving innocent plaintiffs. No doubt for these sorts of reasons, the modified joint and several liability rule was incorporated, after extensive and careful deliberation, in the Uniform Comparative Fault Act and, as the *Restatement Third* notes, has been widely endorsed. *See Restatement Third* § C21 cmt. a, reporters' note at 214-16.

The *Restatement Third* notes serious problems with the various hybrid schemes that have been adopted by various

states, including the "California" scheme that is suggested by petitioner's amici curiae. Regarding the threshold approach, which releases a defendant from joint and several liability if her percentage of comparative responsibility is less than a certain percentage, the *Restatement Third* states:

> [A]ny threshold is an imperfect way to screen out tangential tortfeasors, and often the threshold is set too high (50 percent) to serve this function well. When there are many tortfeasors, this Track does not perform well, as it virtually guarantees that several liability will be imposed, regardless of the role of any given tortfeasor in the plaintiff's injuries. This threshold series also imposes the risk of insolvency on an entirely innocent plaintiff whenever all solvent defendants are below the specified threshold. To the extent that the justification for modifying joint and several liability is the adoption of comparative responsibility so that the plaintiff may also be legally culpable, imposing the risk of insolvency on an innocent plaintiff is unwarranted.

Restatement Third § 17 cmt. a at 148-49; *see id.* § D18 cmt. c (noting additional problems).

Regarding the "California" approach, which employs joint and several liability for economic damages and proportionate several liability for noneconomic damages, the *Restatement Third* states:

> Some critics contend that this Track works an injustice to those who are not wage earners and thereby suffer a greater proportion of noneconomic damages in a lawsuit. Others, including those that focus on deterrence, would also dispute the proposition that noneconomic damages are less important than economic damages. This Track also treats unfairly the plaintiff who is not comparatively responsible for the injury by imposing the risk of insolvency for noneconomic loss on the innocent plaintiff rather than the culpable defendants. Finally, this track creates some administrative and practical difficulties in its operation.

Id. § 17 cmt. a at 149; *see id.* § E18 cmt. d & reporters' note at 252 (noting additional problems).

CONCLUSION

The Court should reaffirm the longstanding use of joint and several liability as part of FELA's comparative-responsibility regime.

Respectfully submitted.

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August 19, 2002

APPENDIX

No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF AMERICAN LAW PROFESSORS IN SUPPORT OF RESPONDENTS

For the convenience of the court and for purposes of identification, brief biographical sketches of *amici curiae* follow.

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Joseph A. Page, Georgetown University Law Center. Joseph A. Page has taught torts for 38 years and products liability for more than 20 years. His articles and book reviews on the subjects of products liability and worker and consumer safety have appeared in numerous academic publications. His most recent scholarly project in the field of products liability is an article entitled *A Voice of Reason: The Products Liability Scholarship of Gary T. Schwartz*, and published in the South Carolina Law Review. He is currently at work on a monograph on the subject of proximate cause in tort law. Professor Page also teaches food and drug law, communicative torts (defamation and invasion of privacy) and legal process. He is also a member of the American Law Institute.

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